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Supreme Court of the United States

October Term, 1957

No. 475

ANNE E. SCHULTZ, as Administratrix of the Goods, Chattels, Rights and Credits which were of John C. Schultz, and as Administratix Ad Prosequendum of John C. Schultz, deceased,

Petitioner,

vs.

HOME OIL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
On the Brief.

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Petitioner,

vs.

HOME OIL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Anne E. Schultz prays that a writ of certiorari issue to review the mandate of the Supreme Court of New Jersey entered in the above entitled action on the 20th day of June, 1957.

Opinion Below

There was no opinion by the Supreme Court of the State of New Jersey. That Court denied the Petition for Certification of Anne E. Schultz, as such administratrix, to the Superior Court, Appellate Division, to review a final judgment of the Superior Court of New Jersey, Appellate Division which affirmed a final judgment of the Superior Court of New Jersey dismissing the plaintiff's cause of action.

The opinion of the Superior Court, Appellate Division of the State of New Jersey, not officially reported as yet, is annexed hereto.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1257 and Rule 19 of the Revised Rules of the Supreme Court of the United States.

Question Presented

Is the dismissal of a case predicated on injuries and eventual death caused by a gasoline fire and explosion an arbitrary intervention and usurpation of the vested right of a trial by jury guaranteed by the New Jersey State Constitution, in contravention of the Due Process of Law Clause of the Fourteenth Amendment of the Constitution of the United States, where a tort feasor is a corporation engaged in interstate commerce in the sale and transportation of gasoline and its storage within the city limits, when evidence of fault is established on uncontradicted evidence and opinion testimony by a fire chief having over 25 years experience?

Reasons for Granting the Writ

1. Fourteenth Amendment of the United States Constitution.

Due process of law has been denied petitioner by the lower Court's arbitrary refusal to grant her the right guaranteed by the Constitution of the State of New Jersey to a trial by jury.

2. The safety of every person in the United States where gasoline is used, is involved, in direct proportion to the legal responsibility for the manner in which gasoline is transported and stored.

Statement

Anne E. Schultz, as Administratrix on behalf of herself as widow and her four children Charles, born September 3, 1945, Caroline, born January 25, 1947, Donna, born January 23, 1948 and Joanne, born June 13, 1953, respectively claimed damages for the wrongful death of her husband John C. Schultz and for conscious pain and suffering from the date of the accident January 23, 1953, to the date of his death April 20, 1953.

The deceased was 32 years of age at the time of his death.

On January 23, 1953, there was a "flash fire" or explosion at a gasoline service station known as "Tubby's" in Paterson, New Jersey, as a result of which the decedent Schultz, an employee of the lessee of the station, was hurled from within the building through the glass front of the service station (P135a) causing terrible burns from which he died about three months later after indescribable suffering.

The station was operated by Joseph De Marco, under a lease agreement with the defendant Home Oil Company, which furnished all the gasoline and motor fuel sold by De Marco, owned all the outside fixtures and a substantial part of the equipment, including a compressor located inside the one story building, and four underground tanks which had been installed in 1940.

At the close of the entire case, the trial court dismissed the complaint (P169a).

From the judgment entered thereon plaintiff appealed to the Appellate Division of the Superior Court of the State of New Jersey which affirmed the judgment of the trial court on the 11th day of March, 1957.

The opinion of the Appellate Division is annexed hereto.

Plaintiff then petitioned the Supreme Court of New Jersey for certification to the Appellate Division to review the judgment of the Appellate Division affirming the Superior Court of New Jersey, which petition was denied, without opinion, on June 20, 1957.

It was urged by plaintiff before the trial court and before the Appellate Division that the case presented questions of fact for the determination of a jury.

It was urged by plaintiff in her brief submitted to the Supreme Court of New Jersey with her petition for certification

1. that a trial court should not remove a case from jury consideration because in its opinion the testimony of a factual and expert witness seems to it to be improbable.

2. that the trial court should give the plaintiff every legitimate inference the circumstances of the case reasonably support where plaintiff was unable to explain the cause of the explosion because of the death of the only person having knowledge of just what occurred.

3. that the trial court should not remove a case from jury consideration when a factual and expert witness testified that in his opinion the flash fire was proximately caused by gasoline fumes escaping from a vent that was so constructed as to be dangerous in use and that the flash fire originated due to this very danger.

4. that the trial court should not base its opinion that testimony is merely speculative and conjectural on the fact that an expert's opinion does not rest upon the direct proof of a fact but rather that the Court should leave for jury consideration the proof of circumstances including the elimination of all other sources and the proof of the alleged source together with proof of circumstances that in his opinion made it a likely cause.

It was urged by plaintiff in her brief for certification that the decision of the trial court was contrary to the general rules of law for jury trials in negligence cases as enunciated by the opinion of this Court in *Schulz* v. *Pennsylvania Railroad Company,* 350 U. S. 523 (brief, p. 15).*

It was further urged by plaintiff in such brief (p. 16, *et seq.*) that the decision of the law court was contrary to the decisions of the United States Supreme Court, particularly *McAllister* v. *United States of America,* 348 U. S. 19.

This argument was advanced under "Point III" of such brief

> "The decision of the court below is in direct conflict with established law" (brief, p. 16).*

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* This brief is part of the Petition for Certification to the Supreme Court of New Jersey which is part of the record herein.

ARGUMENT

POINT I

Plaintiff was denied her inalienable right to have the disputed questions of fact determined by a jury, a right given her by the Constitution of the State of New Jersey.

The Constitution of the State of New Jersey gives the plaintiff the right of trial by jury. Article I, Section 9.

It is elementary that the plaintiff is entitled to a trial by jury as a matter of right.

In *Rogers* v. *Missouri Pacific Railroad Company*, 77 S. Ct. 443, 450:

> "this court is vigilant to exercise its power to review in any case where it appears the litigants have been improperly deprived of that determination."

In *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, discussing the right to jury trial in cases the court said:

> "The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' We granted certiorari to consider the failure of the District Court to let this case go to the jury."

To the same effect:

Webb v. *Illinois Central Railroad Company*, 77 S. Ct. 451.

Ferguson v. *Moore-McCormack Lines Inc.*, 77 S. Ct. 457.

Gibson v. *Phillips Petroleum Corporation*, 77 S. Ct. 16.

POINT II

Plaintiff has been denied her constitutional rights in that the right of trial by jury guaranteed by the Constitution of the State of New Jersey was refused; in that the trial court arbitrarily invaded and usurped the very function of a jury and assumed to pass upon the weight of the evidence and credibility of the witnesses contrary to the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of life, liberty, or property, without due process of law.

The United States Supreme Court has been very zealous in its determinations that all litigants shall have due process of law.

In *Powell* v. *Alabama,* 287 U. S. 68-69, 53 S. Ct. at page 64:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."

This excerpt from this decision was quoted from at length in *Chandler* v. *Fretag,* 348 U. S. 3, 75 S. Ct. 1, 5.

In *United States* v. *Morgan,* 346 U. S. 502, 74 S. Ct. 247:

> "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief."

In *Kern-Limerick Inc.* v. *Scurlock,* 347 U. S. 110, 74 S. Ct. 403, 410:

> "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

Litigants in civil cases are afforded the protection of the due process of law provision of the Fourteenth Amendment.

The Supreme Court recognizes no distinction between civil and criminal cases in affording the protection of the due process of law provision of the Fourteenth Amendment.

In *Powell* v. *Alabama,* 287 U. S. 68-69, 53 S. Ct. at page 64 the Court applied the doctrine of due process of law "in any case, civil or criminal" whether the Court be "state or federal."

In *Covey* v. *Town of Somers,* 351 U. S. 141, 76 S. Ct. 724, the court of Appeals of New York upheld the judicial foreclosure of tax liens on property owned by incompetent without the protection of a guardian to protect the interests of such incompetent. This Court held:

> "we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

In *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U. S. 306, 70 S. Ct. 652, 657:

> "when notice is a person's due, process which is a mere gesture is not due process."

In Re Murchison, 349 U. S. 133, 75 S. Ct. 623, 625:

> "A fair trial in a fair tribunal is a basic requirement of due process."

Due process of law under the Fourteenth Amendment has protected defendants in criminal cases.

The Supreme Court has rigidly enforced the provisions of the Fourteenth Amendment that defendants in criminal cases shall not be deprived of their liberty without due process of law.

In *Reece* v. *Georgia*, 350 U. S. 85, 76 S. Ct. 167:

> "The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."

In *Pennsylvania* v. *Cloudy*, 350 U. S. 116, 76 S. Ct. 223:

> "The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

To the same effect:

Griffin v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585;
Chandler v. *Fretag*, 348 U. S. 3, 75 S. Ct. 1;
Massey v. *Moore*, 348 U. S. 105, 75 S. Ct. 145;
U. S. v. *Morgan*, 346 U. S. 502, 74 S. Ct. 247.

Under these decisions construing the right of the plaintiff to the protection of due process of law in civil cases, this Court must determine whether the plaintiff was afforded a fair trial as required by the Constitution of the State of New Jersey granting the plaintiff a jury trial, and whether the dismissal by the trial court was a denial to the plaintiff of due process of law.

In *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 378:

> "The trial by jury is justly dear to the American people. It has been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

In *Walker* v. *New Mexico & Co. Railroad Company*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

This Court in recent decisions has upheld the right of the plaintiff to have the issues determined by a jury.

In *Gibson* v. *Phillips Petroleum Company*, 77 S. Ct. 16, the judgment of the Court of Appeals for Fifth Circuit was reversed and judgment ordered for the plaintiff. A reading of the record (232 Fed. 2d, 13) discloses that the plaintiff was injured as a result of an explosion, as in this case. In that case as in this, there were no issues other than those of state (Texas) law.

While the decision of the Fifth Circuit Court of Appeals because of the diversity was a decision comparable to a decision of a state Court of Texas (*Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817), this Court determined that there were issues of fact involved and vacated the judgment of the Court of Appeals and reinstated the judgment of the District Court.

The basis of the decision of the Appellate Division may be summarized.

> "Here, had the proofs been submitted to the jury for determination it would have had to speculate not on probabilities, but on mere possibilities. There was no proof of what agency set in motion the forces that caused the injury to John Schultz, and hence proximate cause would not legitimately have been inferred." (Op. 8a).

The record must be examined to determine the cause of the accident and the probability that the conduct of defendant was a proximate cause of the accident.

It is the fundamental law of this Court that where there may be more than one cause for an accident, the defendant may be held responsible if his conduct became and was one of the causes of the accident.

Porello v. *United States*, 153 Fed. 2d 605, aff. 330 U. S. 440.

Ryan Stevedoring Company v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232.

It is likewise the fundamental rule of law that it is not the obligation of a plaintiff to prove the precise cause of an accident.

Schulz v. *Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608.

Rogers v. *Missouri Pacific Railroad Company,* 77 S. Ct. 443.

Webb v. *Illinois Central Railroad Company,* 77 S. Ct. 451.

Wilkerson v. *McCarthy,* 336 U. S. 53, 57, 69 S. Ct. 413.

Lavender v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740.

McAllister v. *United States,* 348 U. S. 19, 75 S. Ct. 6.

Tennant v. *Peoria & P. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409.

In *Schulz* v. *Pennsylvania Railroad Company, supra,* at page 526:

> "But the courts below took this case from the jury because of a possibility that Schulz might have fallen at a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it could not have been compelled to draw such inferences. For 'the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

In *Webb* v. *Illinois Central Railroad Company, supra,* at p. 454, 77 S. Ct.:

> "That there were other possible sources of the clinker would not, of course, justify a directed verdict in the light of our conclusion that the evidence supports with reason a jury finding that the respondent negligently caused the clinker to be in the ballast used in the repair work and failed to use proper care to discover and remove it. Indeed, we do not think that the evidence would reasonably support a finding that the clinker came from another source."

In *McAllister* v. *United States, supra,* at page 22:

> "Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner."

In *Rogers* v. *Missouri Pacific Railroad Company, supra,* at page 449:

> "*The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.*"

The rationale of the decision of the Appellate Division as to this specific issue as to the activating cause of the accident is reflected by its opinion.

> "The plaintiff's theory of the cause of the accident was that fumes from the outside entered the building and were ignited by sparks from the air compressor. *However, no one gave testimony which would support such a theory.*" (Op. p. 4a)

The testimony shows, as the opinion states, that there was an air compressor in the room at the time of the accident; that while Davenport was in the room after the ac-

cident, the compressor went on and he noticed that it arced excessively (P59a-2).

The opinion also recites that the scorching of the underside of the bench above the air compressor "in all probability would have been had sparks from the compressor caused the fire" (Op. 5a).

The opinion demands proof as to what caused the accident for it states that Davenport

> "did not specify what ignited them (the fumes)" (Op. 7a).

The opinion of the Appellate Division refused to accept proof based on circumstantial evidence. It demands direct and positive testimony as to what started the explosion, a doctrine contrary to all of the rules of law and evidence in negligence cases.

The record is to be examined for the proof that satisfies the requirements of this Court to permit the plaintiff to have her rights determined by a jury.

Certain facts must be conceded:

1. an explosion caused the injuries and death of deceased;

2. the explosion started from within the service station;

3. the explosion was caused by gasoline fumes;

4. circumstantial evidence proves that the fumes were ignited by some cause within the service station.

With these basic facts accepted, the main issue of the case is limited to the origin of the explosion, namely, as to whether

1. it came from fumes which necessarily had their origin within the building itself immediately before the accident; or

2. it came from fumes that came into the service station from outside the building and entered the room through means and from causes testified to by witnesses of the plaintiff.

1. The fumes that caused the explosion did not originate within the building.

This statement is proven by the testimony of witnesses with knowledge of the facts.

De Marco, the owner of the station, testified that he left shortly before the accident and

> "that when he left the station, there were no inflammables about, nor any open kerosene or gasoline cans; and that there were tools to be cleaned." (Op. 4a)

Detective Dworak made an inspection of the premises to determine the cause of the explosion; he found nothing that would be suitable to contain any liquid such as gas or anything of an explosive nature (P126a).

It was conceded by defendant that the witness, Detective John Parr would have given the same testimony as the witness Dworak (P132a).

Deputy Fire Chief Davenport testified that there were no volatile liquids in the one or two pans that were in the station at the time he arrived there shortly after the accident (P56a), that the fire was caused by gasoline vapor and that the containers were not involved in the explosion (P56a); that the "flash fire was due to a vapor and not from a fire that had been burning in an open vessel" (P58a).

that the charring over the entire area was up as high as the ceiling and all the way around (P60a).

> "Now, if there was gasoline in a container, the burning would be in this area. It would not cause a charring in that part of the room." (P60a)
>
> "There is nothing in either of these two pictures which would indicate that the fire in this portion of the building was a fire emanating from an open container." (P62a)

There is no discussion in the opinion of the Court as to any conclusion from their statements that the fire could not have originated from any container within the service station.

2. The fumes originated outside the building and came into the room through vents in the windows and cracks in the doors.

This conclusion is based upon the testimony of the Deputy Fire Chief Davenport.

The opinion of the Court has variously characterized his testimony. It states:

> "Because he found no evidence of volatiles inside the building, he testified that any fumes must have emanated from the vent pipes, but he did not specify what ignited them. He did not qualify as an expert in chemistry or physics, nor as a witness on gasoline tank vents; *so his opinion as to defendant's negligence was at best of little weight.*" (P7a)
>
> "Davenport's testimony as to what path the vapor followed after it left the vents, particularly in view of his admission that he had made no tests to determine the amount of vapor escaping, or how it got into the interior of the building was definitely in the realm of conjecture and speculation. He gave no evidential support for the hypothesis that the vapor seeped or flowed into the building through the ventilation holes or under the doors. All these factors,

added to the highly dispersive nature of all vapors, even in still air, much less in a "drafty alleyway", *make Davenport's explanation not only highly fanciful but almost incredible.*" (P8a)

In other words, the courts arbitrarily assumed the function of the jury and passed upon the weight of his evidence and the credibility of the witness.

However the Court, in its opinion, while critical of the end-result of the testimony of the witness, Davenport, did admit:

> That he testified that the fire was immediately extinguished, that it was a "superficial fire", a "flash fire" involving the whole area instantaneously with no deep penetration of the flames; that all the windows of the station had been blown out, but that there were one or two pans which looked as if they could be used for volatile liquids, he found on inspection no indication that they had recently been so used, nor was there any volatile substance within the building (P2a) he stated that in his opinion the fire had been "caused by gasoline vapor in some manner, shape or form" and concluded that since there were no volatile substances within the station, the vapor of fumes had come from the outside, where the only possible source was vent pipes leading from the underground gasoline tanks (P3a).
>
> He also stated that in his opinion the fumes entered the interior of the office portion through cracks in the bottom of the two doors and through a series of ventilation holes in the wooden frame of its front and side windows, which holes were about three or four feet from the floor and each about 3/16 inches in diameter. In support of this theory that the gasoline vapor came from outside the station, Davenport testified that if the fire had been caused by an open container of gasoline, there would have been a charred area in the floor under the container, but that no such charred area was found (P3a).
>
> When asked if it was probable or possible that the fumes came from the vent pipes and entered the

> ventilation holes at the bottom of the window frames and doors, he answered that it was "reasonably probable", and again when asked the same question he said, "Yes, it is possible." (P3a)

The above are admissions of the Court in its opinion.

The record shows that at the time of the trial Davenport (P44a), 48 years old, was deputy of the fire department, that he was first employed in the department in 1932, was promoted to captain in 1942, drill master in 1946, to the battalion in 1944 and battalion chief in 1946. That he had studied for and passed competitive examinations from which the city authorities made appointments to the various ranks; that his studies had included volatiles (P43a), and particularly gasoline fires that he attended about 7500 fires and that about one thousand had involved gasoline fires (P46a) and that it was his duty to determine the cause after the fire is out (P46a).

That he arrived at the fire in question about 90 seconds after the alarm was given, arriving there about 6:54 P. M. (P47a).

The testimony given at considerable length convincingly proves that there was only a flash fire as he stated:

> "It is a matter of judgment, it is a matter of going to a fire and seeing them, and you can determine, through experience, whether a fire has been burning in an open vessel, or a fire has been a flash fire due to a vapor." (P58a)

> "This picture does not show the presence of any such containers which would also support the contention that it was purely a flash fire and was not a fire from gasoline in an open container." (P62a)

Counsel for defendant was intent in attempting to confuse the witness during his entire testimony as the record shows but these positive statements were made.

> "I have determined, sir, that evening that the fumes that were in that building could not have come from anything that was within the building." (P64a)

"I could not come to a positive conclusion where they did come from, a positive factual conclusion. I have an opinion where they came from." (P64a)

"It came from some other part of the building, some other place than the place that was on fire. It did not come from the building itself." (P65a)

"It is reasonably probable, in my opinion, that the fumes come from the vent pipes adjacent to the building on the left side facing it." (P65a)

"The only possible source, in my opinion, of those fumes was from outside the building, the vents.

* * *

The only possible source of these gasoline fumes in the building, in my opinion, are the vent pipes adjacent to the outside of the building." (P66a)

A reading of the rest of the direct examination of the witness establishes he testified that the fumes came through the vents in the windows (P68a, P72a).

The witness said that the fumes came from the vent pipes which had been extended from the tank to diffuse the gases that came therefrom.

"If the vent pipe was so located that it was below the roof and on the side of the building, on the windward side, the fumes would have to accumulate adjacent to the building and from the direction of the wind, the direction of the building, the vents not being properly constructed, the fumes would enter into this show room or this office room. There was no possible source of gasoline vapors inside the building, in my opinion, in my determination, the years of experience as a fireman, those fumes had to come from some place. It came, in my opinion, and I stated it is only an opinion, from the vent pipes." (P67a)

"The vents were too low. They should have been above the roof, period." (P67a)

The trial court properly stated the testimony of the witness:

> "The Court: No. That is different. I allowed that. He has already told us that it didn't properly diffuse the gases because it didn't come above the roof level. I don't know what more he can say." (P76a)

During the cross-examination counsel for defendant attempted to confuse the witness and attempted to draw the distinction that the witness must testify to absolute facts and not an opinion drawn from the facts themselves. The witness explained his testimony:

> "My opinion, sir, is my own, and I got twenty-five years of experience and I am entitled to my opinion from my years of experience as a fireman, but I can't put opinions on paper, and you know I can't." (P83a)

There was considerable discussion during the cross-examination of the witness as to possibilities and probabilities but the witness testified:

> "I will have to state, sir, it was, in my opinion, it was reasonably probable that the gasoline vapors entered the building by that means.
> The Court: All right." (P87a)

There are some 75 pages of testimony given by the witness Davenport. He made the distinction as to conclusions drawn from the actual visible facts and conclusions drawn from his opinions from the facts. He testified many, many times as to probabilities of causes but throughout his testimony he insisted that there was nothing more than a flash fire, a fire that was immediately extinguished and one that was not caused by any volatile substances within the station.

The opinion of the Court picks out sentences that justify the conclusions drawn by the Court which are other

and different than other parts of the testimony of the witnesses. There are statements as to possibilities but "reasonable probability" has been answered to the same inquiry or inquiries.

Under such circumstances the weight of the testimony and the credibility of the witness are questions for a jury not the Court.

The Court in its opinion has placed an unfair burden upon the plaintiff that it must show the precise origin of the accident, the precise cause or causes of the occurrence, must show with mathematical certainty that defendant is to blame for the injuries and death of John Schultz, a burden specifically rejected by this Court in *Schulz* v. *Pennsylvania Railroad Company, supra*,

> *"Fact finding does not require mathematical certainty."*

The exhibits attached to the appendix show the holes in the frame of the window (Exhibit P-4); and that the vents did not come to the top of the roof of the building; likewise that they were capped (Exhibit P-7).

One other corroborating item of proof is the testimony of the nurse Dolores Stowell that the burns were mostly the back from the hips down, mostly (P-11a), evidence that the site of the burns was from about the location of the holes in the windows downward to the floor.

The law as to probabilities and probable cause has been thoroughly discussed in recent opinions of this Court.

As this Court said in *Schulz* v. *Pennsylvania Railroad Company, supra*:

> "In considering the scope of issues entrusted to juries in cases like this, it must be borne in mind

that negligence cannot be proven by direct, precise evidence such as can be used to show a piece of ground is or is not an acre."

In that case this Court thoroughly discussed the different probabilities as to how Schulz came to his death and the inevitable conclusion was reached that the issues must be determined by a jury.

In *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, at page 22:

"Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner."

In *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct., page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

In *Webb* v. *Illinois Central Railroad Company*, *supra*, at page 456:

"That there were other possible causes of the clinker would not, of course, justify a directed verdict in light of our conclusion that the evidence supports with reason a jury finding that the defendant caused the clinker to be in the ballast used in the repair work and failed to use proper care to discover and remove it."

In *Rogers* v. *Missouri Pacific Railroad Company*, *supra*, page 447:

"At best uncertainty as to the fact arises from the petitioner's testimony and in that circumstance not the court but the jury was the tribunal to determine the fact."

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, at page 62:

> "Courts should not assume that in determining these questions of negligence juries fall short of a fair performance of their constitutional functions."

The *Schulz* and *McAllister* cases, *supra*, cover the law as to probabilities and proximate cause and these decisions strongly confirm the contentions of the plaintiff in this case.

The opinion of the Appellate Division has attempted to piece out scattered facts from which its ultimate result can be justified. Its weakness can readily be ascertained from a consideration of all the testimony, particularly that of Deputy Fire Department Chief Davenport.

Its determination wholly fails to take into consideration:

1. that is is not necessary that the precise exciting cause of the accident must be proven by direct evidence;

2. that circumstantial evidence is proper proof and in many instances it is more satisfactory;

3. that the fumes themselves were not and could not have been actuated by any gasoline within the building;

4. that no explanation has been made to account for the presence of the fumes in the building other than the testimony of Davenport that they came from the vents of the tanks through the holes in the windows or under the doors.

No question has been raised as to the liability of the defendant other than that the proof of plaintiff is not based upon probabilities.

POINT III

Plaintiff has established the special and important reasons required by Rule 19 and the decisions of this Court for the granting of a writ of certiorari in this case.

"Special and important" reasons have been shown to justify the granting of a writ of certiorari in this case because

1. the plaintiff was denied the right of a trial by jury guaranteed by the State Constitution;
2. the courts arbitrarily invaded and usurped the very function of a jury;
3. the courts arbitrarily assumed to pass upon the weight of the evidence and the credibility of the witnesses;
4. the courts have denied the plaintiff due process of law guaranteed by the Fourteenth Amendment.

As this Court said in *Rogers* v. *Missouri Pacific Railroad Company*, supra, at page 451:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

The primary "special and important" reason is that the safety of every person in the United States where gasoline is used, is involved in direct proportion to the legal responsibility for the manner in which gasoline is transported and stored.

The record of the trial court and the opinion of the Appellate Division disclose that there was arbitrarily imposed upon the plaintiff the impossible burden of proving

the precise direct cause of her husband's death, where admittedly there was no eye witness and where the uncontradicted and uncontradictable evidence supported by the opinion of testimony of a fire chief having over 25 years of experience furnished the proof necessary to have the issues passed upon by a jury as required by the Constitution of the State of New Jersey and as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

As this Court said in *Re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 625:

> "A fair trial in a fair tribunal is a basic requirement of due process."

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

THOMAS F. FRAWLEY,
On the Brief.

APPENDIX A.

Opinon of Appellate Division

Argued, February 18, 1957; decided, March 11, 1957.

Before Judges Goldmann, Freund and Conford.

Mr. Harvey G. Stevenson argued the cause for the plaintiff-appellant (Messrs. Stevenson, Willette & McDermitt, attorneys).

Mr. Philip M. Lustbader argued the cause for the defendant-respondent (Messrs. Schneider, Lustbader & Morgan, attorneys; Mr. George H. Harbaugh, of counsel).

The opinion of the Court was delivered by

Freund, J. A. D.

This is an appeal from a judgment of involuntary dismissal entered upon defendant's motion at the conclusion of the entire case. A similar motion made at the close of the plaintiff's case was denied.

The plaintiff sued to recover damages for her husband's injury and subsequent death from a "flash-fire" or explosion at a gasoline service station known as "Tubby's" in Paterson, New Jersey. The station was operated by Joseph DeMarco, under a lease agreement with the defendant, Home Oil Company, which furnished all the gasoline and motor fuel sold by DeMarco, owned all the outside fixtures and a substantial part of the equipment, including a compressor located inside the one-story building, and four underground gasoline tanks which had been installed in 1940. The service station consisted of a service area and an enclosed office portion with two windows, one in front and one on the side, and three doors, two opening on the outside, one at the front and one in the rear, and a side door for access to the service area.

Appendix A—Opinion of Appellate Division

Joseph L. Davenport, for 25 years a member of the Paterson Fire Department and at the time of trial the deputy chief thereof, testified on behalf of the plaintiff that on the evening of January 23, 1953, he responded to a fire alarm which took him to Tubby's Service Station; that he was "in charge of that fire," and that his duties included an investigation to determine the cause of the fire. When he arrived at the scene he saw the plaintiff's decedent, John C. Schultz, lying directly outside the front door of the office of the service station building; that, although severely burned, Schultz was still conscious; that he ordered him wrapped in blankets and taken to the nearest hospital. He also testified that the fire, which was immediately extinguished, was a "superficial fire," a "flash fire," and involved the whole area instantaneously, but that there was no deep penetration of the flames.

He testified further that all the windows of the station had been blown out, but that, although there were "one or two pans" which looked as though they could be used for volatile liquids, he found upon inspection no indication that they had recently been so used, nor was there any volatile substance inside the building. He stated that in his opinion the fire had been "caused by gasoline vapor in some manner, shape or form" and concluded that since there were no volatile substances inside the station, the vapor or fumes had come from the outside, where the only possible source was vent pipes leading from the underground gasoline tanks. He stated that the purpose of such vent pipes is to permit the escape of gasoline vapor which is generated by the agitation of the fuel in the tanks when being either filled or emptied.

The testimony and photographic exhibits disclose that there were two sets of vent pipes: one set of two vents was located in the rear of the building and there is some indication that they were not in use; the other consisting of three vent pipes was located against the outside wall of the

building, and the pipes extended 11½ feet above the ground, to within three or four inches below the roof of the one-story building. When asked whether the fumes came from the vent pipes on the side or rear of the building, Deputy Chief Davenport said he did not know. However, he further testified that the vents should have extended above the roof, although he gave it as his opinion that the vents provided adequate means for the diffusion of any gas fumes which might come from the underground tanks. He also stated that in his opinion the fumes entered the interior of the office portion of the station building through cracks in the bottom of its two doors and through a series of ventilation holes in the wooden frames of its front and side windows, which holes were about three or four feet from the floor and each about 3/16 inches in diameter. In support of his theory that the gasoline vapor came from outside the station, Davenport testified that if the fire had been caused by an open container of gasoline, there would have been a charred area in the floor underneath the container, but that no such charred area was found. However, he admitted that in his written report of the fire he had stated: "Cause unknown," because, according to his testimony, "factually there is nothing here to substantiate what I gave as my opinion." He testified that the fumes that were in the building could not have come from anything that was inside the building that evening, but "it is possible." When asked if it was probable or possible that the fumes came from the vent pipes and entered the ventilation holes at the bottom of the window frames and doors, he answered that it was "reasonably probable," and again when asked the same question, he said, "Yes, it is possible." Previously, when asked the same question, he said: "I did not say that the fumes came through. I said it was possible for those to come through and also possible for the fumes to come through the opening of the frame door at the rear of the building. Those are possibilities, sir." While he admitted

that the Fire Department had an explosion meter and that he had watched it demonstrated, he said that he himself had made no tests on the premise, nor had he checked the vents to determine if fumes were escaping.

Joseph De Marco, the operator of the station, testified that occasionally both he and Schultz smoked inside the service station building; that on the day of the accident, decedent's first day of work, he himself had left for home about 6:15 P. M.; that when he left the station, there were no inflammables about, nor any open kerosene or gasoline cans; and that there were no tools to be cleaned. He further testified that he never saw sparks emitted by the compressor.

The plaintiff's theory of the cause of the accident was that fumes from the outside entered the building and were ignited by sparks from the air compressor. However, no one gave testimony which would support such a theory.

The defendant called two witnesses. The first, Soso Cokinos, who operates a refuse business, testified that he stored his three trucks on Tubby's premises and customarily stopped in at the station in the evening to review the day's work and plan the next day's work. Further, that on the evening of the accident he went to the station at about 6:30 P. M.; that Schultz was cleaning tools in a five-gallon can, half full of gasoline, and that the place was "pretty stuffy and hot and the furnace was going". However, Davenport testified the stove was "out"—this, in spite of the cold winter weather. Cokinos further testified that the gasoline fumes became nauseating as the tools were dropped into and pulled out of the can, and that after about half an hour he left and went next door to a tavern to "finish his receipts for that evening". Shortly thereafter someone came into the tavern and told him of the explosion.

Dr. Clarence Winchell, a chemist called by the defendant, testified as an expert witness that he examined the

premises on seven different occasions in December, 1955 and January, 1956; that he made a series of tests with a meter and otherwise for gas fumes coming from the vent pipes, but found none; that any gasoline vapor leaving the pipes would disperse so quickly that after travelling 15 to 20 inches it would be incombustible. Since the three vent pipes in question extended 11.6 feet in height, he concluded that the fire and resulting explosion "could not possibly" have been caused by fumes emanating from the vent pipes. However, he testified that the underside of a bench above the air compressor, while slightly scorched, was not blistered, which in all probability it would have been had sparks from the compressor caused the fire.

From the judgment of involuntary dismissal at the close of all the evidence, the plaintiff appeals, arguing that the trial court erred in taking from the jury the issues of responsibility, dangerous condition, negligence and nuisance under the foresight for harm doctrine, and in excluding evidence as to the custom of the trade with respect to construction and maintenance of vapor vents.

The plaintiff's cause of action is predicated upon the alleged negligence of the defendant in failing to observe its duty of care toward the plaintiff. Negligence is never presumed and the burden of proof is upon the plaintiff. *Callahan* v. *National Lead Co.*, 4 N. J. 150 (1950); *Shellhammer* v. *Lehigh Valley R.R Co.*, 14 N. J. 341 (1954), cert. denied 347 U. S. 990, 98 L. Ed. 1124, 74 S. Ct. 852 (1954), rehearing denied 348 U. S. 852, 99 L. Ed. 672, 75 S. Ct. 20 (1954). The question of whether the defendant was negligent or violated a duty it owed to the decedent or whether its action could, under the facts and circumstances here presented, be viewed as such by a reasonable man, cannot be considered in the abstract. If there is no proof that such negligence was the cause of decedent's injuries, the contention must fall. *McCombe* v. *Public Service Railway Co.*, 95 N. J. L. 187 (E. & A., 1920); *Mc-*

Cappin v. *Park Capitol Corp.*, 42 N. J. Super. 169 (App. Div. 1956). For the plaintiff to recover damages, the evidence must be sufficient to sustain the hypothesis that defendant's negligence resulted in plaintiff's injury.

Here, on defendant's motion for involuntary dismissal at the close of all the evidence, the trial court entered a judgment dismissing the complaint. The motion for dismissal was made pursuant to *R.R.* 4:42-2(b) which provides that the defendant may move for a dismissal of the action on the ground that upon the facts and the law the plaintiff has shown no right to relief. On such a motion the court must take as true all evidence which supports the claim of the plaintiff and give him the benefit of all legitimate and logical inferences to be drawn therefrom, *McKinney* v. *Public Service Interstate Transp. Co.*, 4 N. J. 229, 243 (1950); *Mellon* v. *Penna.-Reading Seashore Lines*, 7 N. J. 415, 419 (1951), including those inferences which arise from the proofs offered on defendant's behalf, *Van Cott* v. *North Jersey St. Ry. Co.*, 72 N. J. L. 229 (E. & A. 1905); *Hawthorne* v. *Jowett*, 121 N. J. L. 38 (E. & A. 1938) However, to recover for injuries sustained because of the negligent act of another, especially where the evidence is circumstantial, the proofs must show not merely a possibility, "but a probability that the injury resulted from defendant's negligence", *Woschenko* v. *C. Schmidt & Sons*, 2 N. J. 269, 277 (1949); *Flexmir, Inc.* v. *Lindeman & Co.*, 4 N. J. 509, 514 (1950); *McCappin* v. *Park Capitol Corp.*, *supra*.

We have carefully examined the evidence here presented in the light of the above stated principles of law. We note that the flash fire or explosion occurred on a cold evening in January, 1953; that gasoline is not very volatile under such weather conditions; that the vapor vents would expel vapor fumes from the underground storage tanks when being filled or emptied, but that neither operation was taking place at the time of the accident. The theory

of the plaintiff's cause of action is that gasoline vapor which left the vents at a height of 11½ feet above the ground descended to about three or four feet above the ground and entered the station office through ventilation holes 3/16 of an inch in diameter, or through cracks in the door—in a concentration sufficient to be explosive. Joseph DeMarco, the operator of the station, testified that at the side of the building where the vent pipes were, there is a "drafty alleyway". Clearly, the draft would not be in the direction of the ventilation holes in the windows, but in a transverse direction, and would operate to disperse more quickly any gasoline fumes which might have leaked from the vent pipes. Moreover, it should be noted that the gasoline fumes would after emanating from the side vent pipes not only have had to permeate a "drafty alleyway", but would have had to turn a corner in order to seep through the front or rear door.

The plaintiff's only witness as to causation and negligence was Deputy Chief Davenport, who testified that the vents were too low; that, according to all the leading authorities on this particular type of installation, they should have been above the roof; but when asked specifically whether the vents permitted sufficient diffusion, he said, "In my opinion, they did, sir." Because he found no evidence of volatiles inside the building, he testified that any fumes must have emanated from the vent pipes, but he did not specify what ignited them. He did not qualify as an expert in chemistry or physics, nor as an expert on gasoline tank vents; so his opinion as to defendant's negligence was at best of little weight. *Rempfer* v. *Deerfield Packing Corp.*, 4 N. J. 135, 145 (1950). In *Bowman* v. *Central R. Co. of N. J.*, 27 N. J. Super. 370, 373 (App. Div. 1953), it was stated that "Negligence or a circumstantial basis generating a logical or legitimate inference of its existence must be established by competent proof."

Davenport's testimony as to what path the vapor followed after it left the vents, particularly in view of his admission that he had made no tests to determine the amount of vapor escaping, or how it got into the interior of the building, was definitely in the realm of conjecture and speculation. He gave no evidential support for the hypothesis that the vapor seeped or flowed into the building through the ventilation holes or under the doors. All these factors, added to the highly dispersive nature of all vapors, even in still air, much less in a "drafty alleyway," make Davenport's explanation not only highly fanciful, but almost incredible. Indeed, as stated, he himself admitted that "factually there is nothing here to substantiate what I gave as my opinion."

In *Ferdinand* v. *Agricultural Ins. Co. of Watertown, N. Y.*, 22 N. J. 482, 493 (1956), it was stated that "when the proof of a particular fact is so meager or so fraught with doubt that a reasonably intelligent mind could come to no conclusion but that the fact did not exist there is no question for the jury to decide. Likewise, when the proof on a question of fact is so strong as to admit of no reasonable doubt as to its existence, again, there is no question for the jury to decide. In both these cases the court must make the determination and advise the jury accordingly."

Here, had the proofs been submitted to the jury for determination it would have had to speculate not on probabilities, but on mere possibilities. There was no proof whatever of what agency set in motion the forces that caused the injury to John Schultz, and hence proximate cause could not legitimately have been inferred. *McCombe* v. *Public Service Railway Co., supra.* Surmise and conjecture cannot be substituted for competent probative evidence. *Matchett* v. *F. C. Reinhardt Holding Co.*, 110 N. J. L. 601 (E. & A., 1933); *Shellhammer* v. *Lehigh Valley R.R. Co., supra*, at p. 344.

Although the plaintiff contends on this appeal that the court erred in excluding evidence as to trade custom in the construction and installation of vent pipes in service stations, in view of the fact that the record is devoid of any evidence that the construction of the vent pipes, even if substandard, caused decedent's injury, the contention would not warrant reversal. *Ball* v. *Atlantic City Ambassador Hotel Corp.*, 137 N. J. L. 744 (E. & A., 1948).

Affirmed.

APPENDIX B

Mandate on Affirmance

This cause having been duly argued before this Court by Harvey G. Stevenson, counsel for the appellant and Philip M. Lustbader, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Law Division to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Divsion, at Trenton on the 11th day of March, 1957.

I. GRANT SCOTT,
Clerk of the Superior Court.

I hereby certify that the foregoing is a true copy of the original on file in my office.

I. GRANT SCOTT,
Clerk.

APPENDIX C

Order Denying Petition

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Harry Heher, Senior Associate Justice, at Trenton on the 30th day of June, 1957.

JOHN H. GILDES,
Clerk of the Superior Court.

Filed:

Jun 30 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 475.

ANNE E. SCHULTZ, as Administratrix of the Goods, Chattels, Rights and Credits which were of John C. Schultz, and as Administratrix Ad Prosequendum of John C. Schultz, deceased,

Petitioner,

vs.

HOME OIL COMPANY, a corporation,

Respondent.

BRIEF OPPOSING THE ISSUE OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

SCHNEIDER, LUSTBADER & MORGAN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 475.

ANNE E. SCHULTZ, as Administratrix of the Goods, Chattels, Rights and Credits which were of John C. Schultz, and as Administratrix Ad Prosequendum of John C. Schultz, deceased,

Petitioner,

v.

HOME OIL COMPANY, a corporation,

Respondent.

BRIEF OPPOSING THE ISSUE OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Respondent Home Oil Company prays the Court deny the Petition filed herein on the grounds that (1) no substantial federal question is presented, (2) the asserted grounds urged as the basis for the issue of the writ herein were not raised at any prior stage of the proceedings below, and (3) no right guaranteed petitioner under the Constitution of the State of New Jersey has been denied below.

Opinion Below.

The opinion set forth in the Petition is that of the highest court of the State of New Jersey to which an appeal as of right will lie under the circumstances of this case. Further review by the Supreme Court of New Jersey is available only by was of certification, pursuant to Rules of the Supreme Court, R. R. 1:10-2, the text of which is set forth in Appendix I, *infra*. As can be seen, the ground urged before this Court for the issue of certiorari is not enumerated among the criteria governing the granting of certification. The proper method of raising before the Supreme Court of New Jersey the question now urged is by petition for certification to the trial court, for at that much earlier stage of the proceedings, questions concerning constitutional rights may be reviewed. R. R. 1:10-3 (Appendix II). Such procedure was not followed below. Respondent submits that, if any constitutional question is to be considered here, petitioner must cite from the record the opinion of the trial judge which trespassed upon her right.

Jurisdiction.

Respondent denies that the proper basis for certiorari has been laid by petitioner. The statute provides that such review may be had only from "Final judgments or decrees rendered by the highest court * * * in which a decision could be had * * *." 28 U. S. C. 1257; June 25, 1948, c. 646, 62 Stat. 929. From what has immediately preceded, it is clear that a review of the constitutional issue raised here might have been obtained before the Supreme Court of New Jersey. No such relief was sought.

Respondent further denies that Rule 19 gives any color of propriety to petitioner's application, for nowhere in the petition is it pointed out where a state court has decided a federal question of substance in the proceedings below. Rule 19, par. 1 (a).

Questions Presented.

1. Where, in a state court negligence action, plaintiff fails to prove any act of defendant's was negligent; fails to establish within the realm of reasonable probability circumstances indicating any negligence of defendant, and fails to exclude the probability that plaintiff's injury stemmed from causes with which the defendant's conduct was unconnected; produces proof from which an inference of negligence is no more probable than freedom from negligence; offers opinion evidence which admittedly is not based upon a factual foundation and, in sum, fails to produce a *prima facie* case, is it the duty of a trial judge to take the case from the jury and enter a judgment of dismissal as a matter of law?

2. Where plaintiff has failed to assert in any state court that his constitutional rights have been infringed, and cannot now point to any place in the record at which such an assertion has been made; and further has failed to include in his Petition for Certiorari any such indication, should this Court deny certiorari?

3. Are not plaintiff's procedural remedies defined by the rules and law of the forum in which he has instituted his action, absent the assertion of a paramount federal right?

4. Will this Court grant certiorari to review a factual conclusion in which three courts below concur?

Reasons for Denying Certiorari.

1. All the courts below concur in finding that plaintiff's evidence fell short of establishing a *prima facie* case.

2. Plaintiff has never heretofore raised any constitutional questions involving either a federally protected right or one protected by the Constitution of the State of New Jersey in this action.

3. The action of all the state courts herein have accorded with New Jersey law and the state and federal constitutions.

Statement of the Case.

This action was brought to recover damages for injuries inflicted upon plaintiff's decedent allegedly caused by the negligent conduct of several defendants, of which respondent, Home Oil Company (herein called "defendant") was one named in the complaint. On motion for judgment made by defendant at the close of all evidence (Tr. 380), the trial court entered final judgment dismissing the complaint on the ground that plaintiff had produced no evidence tending to establish that the injury complained of was the result of any negligence on the part of defendant (Tr. 384 to 385). The final judgment of the trial court was appealed on the merits to the Superior Court of New Jersey, Appellate Division, and affirmed unanimously. (Appendix A.) Thereupon, plaintiff petitioned the Supreme Court of New Jersey to grant certification on the grounds (1) that the decision of the Appellate Division conflicted with other decisions of that court, and (2) that the decision of the Appellate Divi-

sion was in conflict with "established law". The Supreme Court denied certification. (Appendix C).

On January 23, 1943 (Tr. 119) at approximately ten minutes to seven in the evening (Tr. 119, 262), at 333-335 River Street, Paterson, New Jersey (Tr. 120, 262); at a gasoline filling station commonly known as "Tubby's" (Tr. 120) there occurred what was variously described as "a superficial fire" (Tr. 132), "a flash fire" (Tr. 133) and an "explosion" (Tr. 81). Plaintiff's decedent, John Schultz, was employed by the owner of the station, Joseph DeMarco (Tr. 59), at a salary of $50.00 per week (Tr. 61). He was on duty at the time these events occurred and was severely injured (Tr. 131, 132), of which injuries he subsequently died (Tr. 236).

Soso Cokinos is a refuse dealer who used to park his three trucks (Tr. 282) behind Tubby's Gas Station (P189a-17). At the close of the day's business, he would do his bookkeeping, and plan the next day's business operations, in a corner of the station office (Tr. 283). On the date in question, Soso entered the office at about 6:30 P. M. and began his usual routine of work (Tr. 284). It was stuffy and hot in the station, but there were then no gasoline fumes noticeable (Tr. 285). After Soso had been thus engaged for some brief period of time, John Schultz came in with a bucket (Tr. 305), or can, of about four or five gallons' capacity (Tr. 285). Cokinos estimated that it contained about 2½ gallons of gasoline (Tr. 303). Schultz began cleaning tools with the gasoline (Tr. 284) and this activity generated a great concentration of gasoline vapor which became nauseating (Tr. 303). After complaining to John Schultz about the fumes (Tr. 254), Soso left for the

tavern next door to the station to complete his task (Tr. 286). Shortly thereafter the "explosion" in question occurred, and Soso, together with some others, returned to the scene (Tr. 301). Perhaps it may be signally significant to observe at this point that DeMarco testified John Schultz was a smoker, and that he smoked while inside the station (Tr. 97).

The gasoline station building had two sets of gas tanks in the ground (Tr. 50), each with its own sets of "vents"; that is, pipes running from the underground tanks to a point upon the exterior walls of the station itself. Two of these vents, the ones in back of the building, had been installed prior to any time that either DeMarco, or defendant, had any connection with the station (Tr. 54, 56). The other vents, together with the tanks they served, were installed in 1940 (Tr. 51) by Aquino Construction Company, apparently at the request of defendant (Tr. 52). These vents appear to have been located on a side wall of the building.

In the walls of the station there were two fixed windows —"big windows like store windows"—(Tr. 69) in the bottom frames of which were a series of little holes (Tr. 68) (also described in the testimony as "vents"). These holes were always open and admitted a certain amount of circulation of air between the exterior of the building and its interior (Tr. 70). Also there was an air compressor in the office (Tr. 57). The brushes of the motor for this compressor were exposed, but DeMarco stated that he had never seen any sparks given off from them before the date in question (Tr. 60).

To establish some evidence of negligence on the part of defendant, and also to show some degree of causal connection between the injury to plaintiff's decedent and the supposed negligence, plaintiff relied upon the testimony of Joseph L. Devenport, deputy chief of the Paterson Fire Department (Tr. 113). Devenport was the fire commanding officer at the scene of the alarm, and it was his duty to determine as well as he was able, the cause of the fire he had come to extinguish (Tr. 119). In doing so, he had a brief conversation with DeMarco at the scene of the alarm (Tr. 120) with respect to the conditions in the station prior to the fire (Tr. 121 to 123). He then looked inside the building, seeking especially after any containers which might have held a volatile liquid (Tr. 134). He found one or two shallow pans, but concluded from his inspection of them that they had not contained any such liquid (Tr. 134). Devenport did determine that the fire had been caused by gasoline vapor "in some manner, shape or form" (Tr. 134). Devenport did not determine, and plaintiff offered no proof as to, why this gasoline vapor exploded at all. Even now no efficient agent is mentioned. Having found no source of vapor within, Chief Devenport concluded that it must have come from outside the building; specifically from the vent pipes (Tr. 150).

Thus, the factual issues upon which a conclusion of defendant's liability was made to depend appeared, from plaintiff's case to be: (1) the source of any gasoline vapor (assuming, *arguendo,* that the substance was the efficient agency), (2) the method of introduction of such vapor into the room where the fire occurred, (3) the agency that ignited the vapor on the site, (4) whether any other agency

concurred with, augmented or superseded the effect of the igniting vapor, and (5) whether any act or omission of defendant, as distinguished from that of any other person, in the judgment of a reasonably prudent man, forseeably might probably have brought into play any of the foregoing elements, and, if so, (6) whether such foregoing elements were the natural and proximate consequence of the said act or omission of defendant or of another, or both.

The first factual difficulty encountered by plaintiff was the production of any reliable evidence as to the source of the gasoline vapor supposed to have been the agent of destruction. Both Chief Devenport and Detective Dworak, in searching for the origin of this fire, looked for a container with gasoline in it (Tr. 147; 233). Neither found such an article.

On the question as to where the fumes did come from, plaintiff offered Chief Devenport as "the greatest expert in the world" (Tr. 170). The chief, finding in his own opinion "no possible source of gasoline vapors inside the building" (Tr. 150), concluded that the fumes came from the exterior vent pipes (Tr. 151). The chief stated that these fumes *could have entered* the building through the front door, the back door, or the holes in the window frames already mentioned (emphasis added). Actually, however, Chief Devenport did not come to any factual conclusion as to the origin of the fumes in question (Tr. 145, 146). He did have an opinion on the subject, but, factually, the chief admitted that there was nothing to substantiate what he gave as his opinion (Tr. 172, 173). In view of there being two sets of vent pipes on the building, only one set having been installed by defendant, defendant's attorney assumed,

for the sake of the inquiry he was then conducting, that fumes had come from one set or the other of the vent pipes, as Devenport has concluded. The chief was asked "did the fumes that you think went into the building come from the vent pipes on the side of the building or from the vent pipes at the rear of the building?" (Tr. 184). The witness couldn't answer the question—he didn't know (Tr. 184, 185). When he was given a fresh opportunity to answer the same question, the chief—quite consistently—again replied that he could not with a reasonable degree of probability, indicate which pipes were the source of the fumes (Tr. 190, 191). In point of fact, although the chief had available an explosion meter (Tr. 199) with which to test for the presence of fumes, he never tested either set of vent pipes to see whether either could be the source of the gasoline vapor (Tr. 202). Further, he admitted that any gasoline vapor forced out of these vent pipes when the tanks had last been filled probably had been dissipated in the air within the 24 to 36 hours preceding the fire (Tr. 202, 203). He admitted frankly that none of these fumes went into the building (Tr. 203, 204).

Despite the apparent lack of a factual foundation therefor, Chief Devenport nevertheless was permitted to express his opinion at the trial that the outside vent pipes were the only "possible" source of the fumes that caused the fire (Tr. 149). In contradistinction to this opinion, the witness had submitted an official report on the fire in question in which he listed the cause as one of "unknown origin of suspicious nature" (Tr. 171, 206). However, on cross examination, he was asked whether his opinion would be the same if when he arrived at the scene he had seen a container of gasoline inside the station with tools in it. The witness

answered that his opinion would not be the same (Tr. 209, 210). Defendant then asked what opinion the witness would have if he had seen the facts as hypothecated to him but plaintiff's attorney would not permit the question to be answered (Tr. 211, 212). Significantly, the factors included in this hypothesis were later testified to by defendant's witness, Soso Cokinos. To be sure, plaintiff's attorney made much of the fact that Cokinos could not find the bucket Schultz had used in any of the photographs taken by the police at the fire (Tr. 302, 303). This oddity was cleared up later on, however, when the witness Winchell testified that these photographs did not include the portion of the office at which the fire started (Tr. 378).

Whether fumes could come from the exterior vent pipes and enter the building was the second difficulty plaintiff had to surmount. To begin with, the chief testified that the vents, at the time the fire occurred, were an adequate means of diffusing gasoline fumes rising from the tanks underground (Tr. 163). This accorded with his testimony, previously mentioned, that vapor expelled 24 to 36 hours prior to the fire had dissipated into the air and not entered the station building. However, plaintiff's theory, and the witness' testimony, was that gasoline vapor came out of the vent pipes and *accumulated* adjacent to the building (Tr. 150). (Not even a wild guess was made as to how the vapor "accumulated" before it seeped into the building.) Then, the story goes, the vapor entered the building through the doorways and the holes beneath the large, fixed windows (Tr. 156). As the witness put it, "Any of these openings is a possible source for the gas fumes to get into the building, any of these openings are a possible source" (Tr. 152). And again, in speaking of the holes in the win-

dow frames, the witness described them as things "which could be a source for gasoline vapors in the building" (Tr. 157). When pressed on this point, however, Devenport denied having made a categorical statement that the vapor probably did go through the window-sash holes. He "stated that that could be the case" (Tr. 176). He made the same reservation with respect to the back door, stating that the entrance of vapor through both the window-sash holes and the back door was only a "possibility" (Tr. 178, 189).

With respect to these window-sash holes, although the chief had told the jury that they "could" have been the means whereby vapor entered the building, he didn't even investigate to find out before he testified whether these holes went all the way through the window sash! (Tr. 194, 195).

On the two general factual questions which preceded all the others, then, namely (1) where the vapor came from, and (2) how it got into the building, plaintiff's case is aptly summed up by the testimony of the witness Devenport (Tr. 145, 146) "I could not come to a positive conclusion where [the gasoline fumes] did come from, a positive factual conclusion."

Curiously enough, this inability to draw a conclusion affected Devenport's testimony throughout, and on a great many issues. He stated first that it was "possible" that the fumes came from the exterior vents (Tr. 147). Then, after a warning by the court, he amended his opinion to say that it is reasonably probable that the fumes came from the vents (Tr. 148). It was only a few lines later, however (Tr. 149), that the witness was again referring to these vents

as a "possible" source of gasoline fumes. Obviously, the witness was unsure of himself, and had little reliance upon opinions (Tr. 150, 151), especially his own. Again in referring to the means whereby vapor entered the building, Devenport referred to the windows, doors, etc., as "possible" sources for gas fumes to get in (Tr. 152). While the trial court indulged what might have been a semantic lapse when defendant's attorney objected previously (Tr. 149), on this occasion the trial judge again directed the witness to give only opinions founded upon circumstances reasonably probable (Tr. 152). The warning was futile. Shortly thereafter, Devenport again referred to the window-frame holes by stating they "could be" a source for gasoline vapor (Tr. 157). That the witness meant exactly what he said was made quite clear when he observed, in respect of this contention (Tr. 176) "I stated that that could be the case, in my opinion. I didn't state categorically that that was so." Again (Tr. 178) "I did not say that the fumes came through. I said it was possible for those to come through and also possible for the fumes to come through the opening of the frame door at the rear of the building. Those are possibilities, sir." And again the trial judge intervened, following which the witness again amended his testimony to say that such "possibilities" were reasonably probable (Tr. 178). The amendment was short-lived, for Devenport returned almost immediately to his discussion of "possible" sources of vapor (Tr. 179). As the witness stated to the court to explain his frequent regressions to the realm of possibility, as it were, he had difficulty distinguishing between things "possible" and things "reasonably probable" (Tr. 180). Things to him could be both "probable" and "possible" at the same time (Tr. 182).

When pressed to select which alternative he chose to employ his opinion, Devenport very honestly answered "I don't care to make a choice" (Tr. 182). Actually, in predicating his opinions upon possibilities, Devenport was merely keeping safely within the ambit of what few facts he had. This is most aptly illustrated by the case of his opinions as to where the vapor came from in the first place. Having no facts to go on at all, the Chief had to stick to "possibilities" on that score.

In fact, Devenport appeared to be quite unable to grasp the concept of "reasonable probability." He considered things "possible" and things "reasonably probable" to be interchangeable and practically synonymous (Tr. 182).

Following this rather confusing series of opinions, plaintiff's attorney disclaimed his former assertions concerning Chief Devenport's capacity as an expert witness (Tr. 170), and stated that the chief was a fact witness, and "* * * not here in the capacity of an expert" (Tr. 184). No offer was made to withdraw the expert opinions put by Devenport before the jury.

Concerning the route followed by the vapor, Devenport's opinions were equally confusing. He stated, several times, that it was either probable or possible that fumes came from one or more of the outside vents and entered the building at one or more of the openings described (Tr. 185, 186, 187, 189). There was, however, one point upon which there was absolutely no confusion. Defendant's attorney asked whether Devenport could state with a reasonable degree of probability whether gasoline fumes came out of the vents on the side of the building *or* whether such fumes came out

of the vents at the rear of the building. The witness was pointedly frank in stating that he could not tell whether such fumes came out of either set of vents (Tr. 190, 191) with a reasonable degree of accuracy. He was even more frank a few moments later when he blandly admitted that his whole prior testimony as to the source of the vapor and its possible routes into the building was given without any basis in fact as to the actual origin of the fumes themselves (Tr. 191). This testimony, following as it did the scene of vacillation just described, indicated that Devenport probably was intelligent enough to recognize the difference between "possible" and "probable" when faced with an inescapable necessity to select the alternatives, in defendant's opinion.

Plaintiff did not directly indicate the agency that ignited the vapor in the building, if such actually occurred. The suggestion was made, however, through Devenport's testimony that the brushes on the air compressor arced against the commutator (Tr. 138). No attempt was made to show that these brushes probably sparked before the fire. In fact, plaintiff's witness DeMarco stated that he had never seen sparks from the compressor prior to the fire (Tr. 60). However, Devenport testified that while he was making his investigation immediately after the fire, the compressor started up and the brushes on the motor arced excessively (Tr. 138). When asked what he meant by "arced", the chief volunteered that he meant that there was a "visible electric arc." Those were his own words. Plaintiff's attorney then asked, "What do you mean by a visible electric arc?" (Tr. 138). The answer, although in the vernacular, was quite enlightening. It was: "You got me" (Tr. 139).

The reason Devenport speculated about the possible exterior source of gasoline vapor was that he could find no container inside the building that had held a volatile liquid (Tr. 144). Plaintiff's witness Dworak had had the same idea as Devenport originally had; that is, to look for a container of gasoline inside the station. But his search was equally fruitless (Tr. 233). However, there had been a bucket of gasoline inside that station just before the fire. Soso Cokinos had seen it in decedent's possession (Tr. 305). Schultz had been using it to clean tools (Tr. 284) and by this activity had generated such a quantity of vapor that Soso was moved to go elsewhere. Shortly thereafter the fire occurred (Tr. 301).

Devenport served plaintiff in one further facet of the case. Plaintiff's thesis, as disclosed by almost the entire testimony of DeMarco, was that defendant maintained the gas station in an unsafe and hazardous condition. It was shown that the premises were leased from defendant; that defendant appears to have installed some tanks for gasoline in 1940, and supplied divers items inside the station itself, including the air compressor. Of the five vents, it was made clear that two were *not* put up by defendant. Thus plaintiff had to resort to Devenport in an attempt to cover this factual opening in its circumstantial collection.

As has already been noted, Devenport could not say that, in any degree of probability, the source of the vapor that started the fire was the vents installed by defendant. Therefore, plaintiff tried to use Devenport as an expert on the question of the proper way to *maintain* a gas station (Tr. 158). Plaintiff began by asking whether there was a custom in the trade governing the height of tank vents.

Defendant objected and the court observed that the proper standard would be that in effect in 1940 when the vents built by Aquino Construction Co. were installed. Devenport wasn't asked further by plaintiff on that subject. Shifting his approach, plaintiff's attorney then asked Devenport whether the station, as maintained on the date in question, was a safe place to work (Tr. 160). Defendant also objected to this approach because the witness was not qualified, and the court sustained that objection (Tr. 160, 161). The third approach, however, was to prove more successful—but not much more.

Plaintiff finally asked the witness whether the vents, as they were maintained at the time in question, were adequate to diffuse gasoline vapor from the underground tanks (Tr. 162). As noted by the court, he had said previously that the vents should have come above the roof level, which admittedly they did not. This time, however, plaintiff got a surprise because Devenport replied that these vents *were* adequate for diffusing gasoline vapor (Tr. 163). Then the chief went on to state that he thought that the recommended practices of certain fire associations should be observed (Tr. 164). His offer to testify as to what those recommended practices were was rejected as incompetent by the court. Finally, Devenport stated that, in his opinion, vents should extend above the roof. Defendant's objection to this testimony was interrupted by a further question to Devenport as to whether having the vents below the roof-line was safe or unsafe. The objection to this was sustained.

Although throughout this part of the examination, the court ruled consistently against plaintiff, plaintiff's attor-

ney stated that he did not consider these rulings prejudicial to his client's case (Tr. 165). The last word on the subject was spoken when Devenport admitted that there was no regulation in the Building Code, the Fire Code or any ordinance of the City of Paterson prescribing the minimum height for a vent pipe (Tr. 212, 213).

This was the entire attempt of Plaintiff to produce evidence of any conduct of defendant which could be alleged to have been negligent.

In contradistinction to plaintiff's offer of proofs as to how the fire in question occurred, defendant produced Dr. Clarence W. Winchell, an expert witness of extensive formal education (Tr. 311, 312), practical training (Tr. 312) and years of public service (Tr. 312 to 314), the latter of which included the investigation of fires (Tr. 332), some of which were serious gasoline fires. Dr. Winchell made a thorough and detailed investigation of Tubby's Gas Station, involving seven different occasions (Tr. 314, 319).

First, Dr. Winchell checked the station, inside and out for char, burns, scorch and blisters caused by the fire, and made several photographs which were introduced in evidence showing the burn patterns he found (Tr. 320, 321, 322). Considering Devenport's testimony, already discussed, concerning the arcing brushes on the air compressor, and the implicit suggestion that that phenomenon ignited the vapor in the station, it is significant to note especially that Dr. Winchell found that the underside of the bench covering the air compressor showed a scorch pattern but no blister pattern. Further, he observed that the scorch pattern was there solely because the wood had had no paint on it (Tr. 323). Most significant, however,

was the further fact that that scorch on the underside of this shelf was only marked at the front edge, and *lessened as one observed to the rear.* This, concluded the doctor, was the mark of a radiation or flame shadow; in other words, no direct blaze touched this wood, so close to the supposed spark that struck the vapor into flame.

Next, Dr. Winchell tested the vent pipes to see whether they emitted any vapor (Tr. 340). In part, he used a gas tester (Tr. 341) (perhaps one not unlike that Chief Devenport had but didn't use) (Tr. 202). The test showed that no vapor came out of the vent pipes (Tr. 342).

The witness made a special series of experiments to determine whether air leaked into and out of the station itself. He sprayed some strongly odorous mists outside in the vicinity of the building, both on calm days and when there was a wind from the side where the vents were located. No one inside the station noticed these smells under either set of circumstances (Tr. 343, 344). With respect to gasoline vapor itself, the doctor testified that it was three to four times heavier than air (Tr. 345), that in still air it flows directly down, becoming more and more dispersed, so that it is not combustible after it has descended 15 or 20 inches from the escape orifice in the vent pipe (Tr. 347, 348). Moving air, he said, disperses vapor with much greater rapidity and also dilutes it a great deal more (Tr. 348).

From his knowledge of the foregoing facts and his inspection of the premises, as well as his expert knowledge, training and experience, Dr. Winchell concluded that, on the date in question, there was a flash fire and resultant explosion inside the gas station caused by fumes within the building. He stated flatly that these fumes could not have

come from outside (Tr. 349), but rather that it was most probable that such fumes come from a container in the office (Tr. 349). From the physical data observed by him Dr. Winchell was able to fix the exact point within the station at which the container lay when the fire occurred (Tr. 350, 351).. This conclusion became even more impressive when it appeared on cross examination that the doctor had arrived at his opinion without even knowing of the existence of the bucket Soso Cokinos testified he saw John Schultz using (Tr. 376).

ARGUMENT.

POINT I.

Plaintiff offered no evidence which, if given its fullest probative force, reasonably tended to support the advanced claim.

(A)

None of plaintiff's evidence as to causation brought the claim of negligence within the realm of probability.

There was no direct evidence of any act of any defendant, much less this defendant, which might have caused the fire and the consequences that followed. All that plaintiff offered was evidence of certain surrounding circumstances from which, it was hoped, inferences of causal connection might be drawn.

In a case involving damages resulting from explosion and fire caused by a flamable liquid, whether the defendant's negligence caused the injuries is a question of fact which must be established by the evidence within the realm

of probability. *Flexmir, Inc.* vs. *Lindemann & Co.*, 4 N. J. 509, 73 A. 2d 243 (1950). To recover for injuries allegedly resulting from the negligent act of another, especially where the evidence is circumstantial, plaintiff must show "not a possibility only, but a probability that the injury resulted from defendant's negligence." *Woschenko* v. *C. Schmidt & Sons*, 2 N. J. 269, 66 A. 2d 159 (1949). The jury should not be left to speculate and deal in possibilities rather than probabilities. *Idem.*

As has been noted, plaintiff's only witness as to causation and negligence was Chief Devenport. And, as appears from the discussion of his testimony, he was unable to state with a reasonable degree of probability whether gasoline vapor came out of the vents on the side of the building or whether such vapor came out of those in back. Further, this witness's entire testimony, both as to the origin of the vapor and as to how he thought it got into the station office, was a series of confusing changes between "possibility" and "probability". Devenport was so unsure of himself, and his opinion on these points that he refused even to elect between the alternatives of "probable" and "possible", although it became apparent that the distinction between the two was not lost upon him. Defendant submits that such evidence fell short of the standard that evidence must meet before it is entitled to a jury's consideration.

Merely being an expert is not enough; such a witness must have facts to support his opinions. *Beam* v. *Kent*, 3 N. J. 210, 69 A. 2d 569 (1949). Defendant submits that it appears of record that Devenport had no such facts underlying his opinions. Thus, plaintiff's argument that the

witness supplied a "probable" causal connection needed to establish defendant's liability must fail. For instance, plaintiff claims the chief testified that pumping gasoline could have caused this discharge of gas fumes, and in his opinion such was the cause. No witness testified that any gasoline had been pumped prior to the fire. Plaintiff contends that Devenport said the vent pipes were dangerous in use, but Devenport had testified (in response to a question from plaintiff's own attorney) that these vents were adequate for diffusing gasoline vapor. From the "possible" sources of entry of vapor into the building, the chief's opinion that vapor actually did enter the station thusly was without factual foundation. In fact, he honestly refused to say that such actually occurred, in all probability.

Where the evidence is all circumstantial, plaintiff must show not only that the injury resulted from defendant's negligence but must "exclude the idea that it was due to a cause with which the defendant was unconnected." *Szczytko* v. *Public Service Coordinated Transport*, 21 N. J. Super. at 264.

The record shows affirmatively in this case that the fire, in all probability, was caused by acts with which defendant was wholly unconnected; namely, decedent's own conduct. That a bucket of gasoline was the most likely source of this fire was even the initial idea of plaintiff's own witnesses Devenport and Dworak. The testimony of defendant's witness Cokinos that Schultz was using a bucket of gasoline just before the station exploded is still uncontradicted in the record. And Dr. Winchell's conclusion that such a bucket was the focus and origin of the heat and flame generated by the fire stands also uncontradicted. Thus, the

entire evidence herein negatives any inference that the injury to decedent was the probable consequence of any act of defendant.

(B)

There is no evidence of a negligent act of defendant.

The right of plaintiff to recover in negligence is predicated upon defendant's failure to observe its duty of care toward plaintiff, and the duty of care is proportionate to the foreseeable risk. *Harpell* v. *Public Service Coordinated Transport*, 20 N. J. 309, 120 A. 2d 43 (1956) "* * * [I]f the defendant * * * knew, or had reason to know, of the danger of injury * * *, then it was under the duty to take reasonable steps to avoid such injury." *Holly* v. *Meyers Hotel and Tavern, Inc.*, 9 N. J. 493, 89 A. 2d 6 (1952).

Plaintiff claims defendant ought to have foreseen the likelihood that decedent might be injured working at Tubby's because the gasoline distribution facilities were unsafe. Who says that they were unsafe? Plaintiff's claim that Devenport tried to say so is amply refuted by the witness Devenport himself when he said that the tank vent pipes were an adequate means of diffusing vapor. If this be believed, what difference does it make whether the witness thought the vents should have been constructed otherwise? Defendant submits that it is immaterial. *Ball* v. *Atlantic City Ambassador Hotel Corp.*, 137 N. J. L. 744, 57 A. 2d 362 (E. & A. 1948). So far as plaintiff's evidence goes, the source of the vapor herein is a guess, its route to the scene only wild conjecture, and no evidence has been produced that this hypothetical vapor caused plaintiff's injury herein. Negligence in the abstract—negligence in

the air, so to speak—will not do. Plaintiff must show the *act* which was negligent. This has not been done.

Rather, to the contrary, the uncontroverted testimony of Dr. Winchell established not only that the height of the vent pipes had no connection with the fire, but, also that, in any event, it would have been absolutely impossible for vapor from those pipes to enter the station in such a way as to cause the fire. Contrary to plaintiff's assertion, the proof is not that defendant constructed the vents. Two of those vents were constructed by someone else. And plaintiff was unable to establish whether the fumes it speculated came from tank vents came from vents constructed by defendant.

As to the maintenance of the station generally as "a safe place to work", plaintiff offered no competent evidence on the point. An attempt was made to have Chief Devenport testify in this regard, but the court ruled that the witness had not been qualified for any such subject. Admittedly, it was within the court's discretion to rule on the competence of a witness. With respect to this ruling, plaintiff's attorney stated that his case had not been hampered by the ruling just mentioned, among others (Tr. 165). *Now* complaint is made that this ruling, and those associated with it, resulted in a prejudicial denial of rights of petitioner.

While it may be, in the abstract, a jury question, as plaintiff contends, whether the station was safe and whether the vents were high enough, these facts did not become material until it was made to appear that the fire occurred as the natural consequence of such conditions, for damages to be chargeable against an alleged wrongdoer must be the natural consequences of his delinquency; "natural" im-

porting that they are such as might reasonably have been foreseen. *Smith* v. *Public Service Corp.*, 78 N. J. L. 478, 75 A. 937 (E. & A. 1910). Negligence is never presumed, it must be proven. *Callahan* v. *National Lead Co.*, 4 N. J. 150, 72 A. 2d 187 (1950). In failing to show that any act of defendant was the natural predicate to the injury to John Schultz, plaintiff failed to define as negligent any act or condition for which defendant was responsible. Also, as a result of such failure, plaintiff failed to show that defendant ought to have foreseen that anything it did would cause a fire injuring John Schultz.

To carry this a step further, defendant's witness Winchell testified that the cause of the fire was vapor rising from a container inside the building itself. This evidence not only was not contradicted, but it coincides curiously with the theory adopted originally by plaintiff's own witnesses, Devenport and Dworak. Cross examination reinforced it. And the testimony of Soso Cokinos took this hypothecated origin of the fire out of the area of circumstantial evidence and placed it in the realm of direct evidence. Thus defendant's uncontradicted evidence completely negatived the frail case put in by plaintiff and, in defendant's opinion, made it legally impossible for any jury to render a verdict for plaintiff, because there was no proof of negligence on the part of defendant.

POINT II.

Involuntary dismissal of the complaint was proper.

The evidence at the trial failed to raise a factual issue either of negligence or of causation. In this posture, the trial court was obliged to enter judgment for defendant for the law required that it do so. *Ferdinand* v. *Agricultural Ins. Co. of Watertown, N. Y.*, 40 N. J. Super. 1, 122 A. 2d 1 (App. Div. 1956), reversed on other grounds at 22 N. J. 482 (1956). All the jury could have done, if they had been given the issue, was speculate as to negligence and causation (as Devenport himself had speculated). That degree of proof is not enough to entitle plaintiff to have the jury's verdict on the case. *Shellhammer* v. *Lehigh Valley R. Co.*, 14 N. J. 341 (1954); cert. den. (1954) 347 U. S. 990, 98 L. Ed. 1124; rehear. den. (1954) 348 U. S. 852, 99 L. ed.

Defendant submits that the best that can be said of plaintiff's evidence is that it amounted to a mere scintilla of what would be necessary to prove a *prima facie* case. But frail proofs do not protect a plaintiff from being nonsuited. *Krolak* v. *Chicago Express, Inc.*, 10 N. J. Super. 60, 76 A. 2d 266 (App. Div. 1950), and the jury could not in this case have legitimately concluded that defendant had been negligent and caused the fire. Thus, involuntary dismissal of the complaint was proper. *Gentile* v. *Public Service Coordinated Transport*, 12 N. J. Super. 45, 78 A. 2d 915 (App. Div. 1951). Any such inferences which might be collected from the evidence in the present case are not superior to other inferences drawn from the great weight of the evidence which indicate the absence of negligence. *Layton* v. *Healy*, 12 N. J. Super. 459, 79 A. 2d 894 (App.

Div. 1951). Thus, the trial court had no choice but to grant defendant's motion asking that the complaint be dismissed. *Giuliana* v. *Ginnelly*, 6 N. J. Super. 76, 69 A. 2d 888 (App. Div. 1949). Taken as a whole, and critically examined, defendant submits that no reasonable and rational inference can be drawn from the evidence that defendant negligently and proximately injured plaintiff. *Mortgage Corp. of N. J.* v. *Aetna Cas. & Surety Co.*, 19 N. J. 30, 115 A. 2d 58 (1955).

POINT III.

The Appellate Division's decision herein is in accord with established law.

A judgment of nonsuit will be affirmed if it can be justified on any legal ground, even though reasons given by the trial court for its action may be erroneous. *Iuliucci* v. *Rice*, 130 N. J. L. 271, 32 A. 2d 459 (E. & A. 1943). Even a ground not relied on by the trial judge can be used to sustain his action by a reviewing court. *Adams* v. *Olsen*, 107 N. J. L. 288, 131 A. 596 (E. & A. 1930).

Where a trial court grants a motion of involuntary dismissal, pursuant to R. R. 4:42-2(b), and this action is appealed, it is the duty of the Appellate Division to examine the entire record and construe the facts in evidence most strongly in favor of the plaintiff. *Fenning* v. *American Type Founders*, 33 N. J. Super. 167, 109 A. 8d 689 (App. Div. 1954). This is the same protection afforded the plaintiff when the motion is made in the trial court. *McKinney* v. *Public Service Interstate Transp. Co.*, 4 N. J. 229, 72 A. 2d 326 (1950). The courts below knew this and recognized

their duty in this case to act as stated. It carefully reviewed all the evidence in the light of the principles of law stated above and concluded that the trial judge has not committed error in granting defendant's motion for judgment of involuntary dismissal. Now petitioner complains that the protection of this procedure was accorded thoroughly below.

Petitioner's claim that the decisions below were not in accord with "established law", and thus violated her federally-protected rights, must stand or fall on the strength of the legal issue made by the petition. This Court has already satisfied itself that where a plaintiff cannot make out a *prima facie* case on the issue of liability under the present New Jersey Constitution, and the Rules of Court governing procedure promulgated pursuant thereto, and thus is non-suited by the trial judge as a matter of law, such action does not merit review by way of certiorari *even where the claim asserted is pursuant to a federally created right and trial by jury is guaranteed by the statute establishing that right. Shellhammer* v. *Lehigh Valley R. Co., supra.* In order for the case of *McAllister* v. *United States of America* (1954), 348 U. S. 19, to be applicable herein, petitioner must show that at least one "probable" cause of the fire was supported by substantial evidence. This was not done at trial, and while the bits and pieces of the record incorporated into the petition might add a gloss of verity to petitioner's complaints now, the fact is that the whole record soundly rebuts any notion that there is virtue in these presently-proffered complaints.

POINT IV.

Plaintiff was not denied any right to trial by jury.

Truly, petitioner's assertions that the courts below violated either the letter or spirit of the 14th Amendment raises only a colorable issue—not a genuine one—much like that in *Colacurcio Contracting Corp.* v. *Weiss,* 20 N. J. 258, 119 A. 2d 449 (1955). The right to trial by jury is subject to State regulation, and the 14th Amendment has not affected the power or right of a sovereign to alter the forms of its judicature. *Morris* v. *Becker,* 6 N. J. 457, 79 A. 2d 29 (1951). Whether a state court should err, even prejudicially, in construing the constitution of the state, or any of the statutes enacted thereunder, such error does not of itself create a federal question. *West* v. *Louisiana* (1904), 194 U. S. 258, 48 L. 2d 965. It is only when the issue becomes intimately involved with a substantial federal right that this Court will intervene. *Hill* v. *Smith* (1923), 260 U. S. 592, 67 L. 2d 419. Probably the best catalogue of the sort of rights involved is offered by petitioner herein. But cases involving the rights of criminals to counsel, cases involving the constitutionality of a state tax statute, cases involving the sufficiency of process upon defendants or respondents, cases involving convictions for contempt of court, cases of unlawful arrest and cases dealing with procedure governed by federal statute or court rule (which pretty well sums up the authorities cited by petitioner at pages 6 through 9) have absolutely nothing to do with the simple question of whether plaintiff at the trial below made out a *prima facie* case. Detailed citation and discussion of petitioner's authority on those pages cannot, we submit,

alter this simple fact. And the determination that plaintiff's proofs fell short of what the law requires is the single essence of this application. Only the full statement of all the facts recited *ante* candidly illuminates this issue, and shows the hollowness of the petition's substance.

The present Constitution of New Jersey provides that "The right to trial by jury shall remain inviolate * * *." Const. Art. 1, par. 9, N. J. S. A. This right is jealously guarded by our courts. *Panko* v. *Flintkote Co.*, 7 N. J. 55, 80 A. 2d 302 (1951). It is, however, neither enlarged or restricted by the quoted language and accords generally to the right existing when the State became independent of the British crown. *Steiner* v. *Stein*, 2 N. J. 367, 66 A. 2d 719 (1949); *Town of Montclair* v. *Stanoyevich*, 6 N. J. 479, 79 A. 2d 288 (1951).

Can it be said that, at any time in history at which one would fix the point of reference, the claims of one private person against another had to be submitted to a jury if litigated at common law? It is submitted that, whatever procedure may have been pursued, no defendant might ever be taxed to submit to a jury a claim which on its face was insufficient in law. And similarly, no defendant may be burdened to submit an issue of fact for decision until plaintiff show a valid issue exists. This is the basis—the very essence—of the scintilla rule. A mere assertion before this Court cannot change the shadow of a right into a substantial right denied. The *facts*, fully stated and fully explored, are the sole criteria upon which the asserted right may be shown to have been deprived. Defendant submits that plaintiff has not shown any deprivation. Contrary to plaintiff's assumption (at p. 22), defendant has raised an issue

of its liability. The case below was tried on that point. That is the very point at which the proofs of plaintiff weakened and gave way.

POINT V.

Petitioner shows no right to certiorari.

Petitioner, in Point III, implies that the proceedings below were not a fair trial, that the courts below were not fair tribunals and that plaintiff's rights at trial were "persistently" trespassed. Contrary to assertions there made, the issue of the public safety from transported and stored gasoline was not even raised by the complaint, much less litigated. Also, contrary to assertions there made (at p. 24) the evidence of plaintiffs was neither "uncontradicted" nor "uncontradictable". Defendant's proofs were a total and devastating rebuttal of plaintiff's theories, beyond peradventure. To submit such evidence as plaintiff's to a jury would be both a mockery and an injustice.

As said before, this is a plain personal injury negligence action. Despite petitioner's strenuous and zealous efforts here, it cannot by some juridic sleight-of-hand be transformed into a "federal case". Until now, plaintiff hadn't even made such an effort.

Rule 19 requires that the record below in respect of federal questions be made plain by the petition, but one may search earnestly throughout the petition for a single mention of even one place in either the trial record or the appellate record where a federal right was raised by plaintiff. The search will be fruitless. This Court, long ago, ruled

on an appeal from the New Jersey Court of Errors and Appeals that matters not presented to the courts below may not be raised initially before you. *Edwards* v. *Elliott* (1874), 88 U. S. 532, 22 L. ed. 487, affirming 36 N. J. L. 449 (E. & A. 1873). This Court has not seen fit to diminish the strength of that decision.

Conclusion.

For the reasons stated, we respectfully submit that the petition for the issue of a writ of certiorari should be denied.

Respectfully submitted,

SCHNEIDER, LUSTBADER & MORGAN,

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Appendix I.

1:10-2. Certification to the Appellate Division on Petition.

Certification to the Appellate Division is not a matter of right, but of sound judicial discretion, and will be allowed on final judgments only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where the Appellate Division has decided a question of substance not theretofore determined by a court of last resort of this State, or has decided it in a way probably not in accord with applicable decisions of such court.

(b) Where the decision under review is in conflict with any other decision of the Appellate Division.

(c) Where the judges of the Appellate Division concur in result, but are unable to agree upon a common ground of decision.

(d) Where the Appellate Division has decided an important question of law which has not been, but should be settled by this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower tribunal as to call for an exercise of this court's supervision.

(e) Where the Appellate Division has decided a question of substance relating to the construction or application of a statute of this State, which has not been, but should be settled by this court.

NOTE: Formerly Rule 1:5-2.

Appendix II.

1:10-3. Certification to Trial Courts on Petition.

Petitions for certification to the trial courts will be entertained on final judgments only in the following types of cases:

(a) Where a substantial question arises under the Constitution or a statute of the United States or of this State, which is of general public importance and which urgently requires adjudication by this court.

(b) Where questions of great public importance are involved which urgently require prompt adjudication.

NOTE: Formerly Rule 1:5-3.